

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SZRVA v MINISTER FOR IMMIGRATION &
ANOR*

[2018] FCCA 2169

Catchwords:

MIGRATION – Application to review decision of the Administrative Appeals Tribunal – whether Tribunal erred in considering whether compelling reasons to waive criteria in Schedule 3 to the *Migration Regulations 1994* (Cth) – no jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.359A, 360
Migration Regulations 1994 (Cth), cl.820.211, Schedule 3 cl.3001

Cases cited:

Babicci v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 77; (2005) 141 FCR 285
CQG15 v Minister for Immigration and Border Protection [2016] FCAFC 146; (2016) 253 FCR 496
Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11; (2016) 237 FCR 1
Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145; (2010) 190 FCR 248
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZNSP [2010] FCAFC 50; (2010) 184 FCR 485
Minister for Immigration and Citizenship v SZRKT [2013] FCA 317; (2013) 212 FCR 99
Monakova v Minister for Immigration and Multicultural Affairs [2006] FMCA 849
MZYPZ v Minister for Immigration and Citizenship [2012] FCA 478; (2012) 127 ALD 510
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 [2003] HCA 30; (2003) 198 ALR 59
Waensila v Minister for Immigration and Border Protection [2016] FCAFC 32; (2016) 241 FCR 121

Applicant:

SZRVA

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 1683 of 2016

Judgment of: Judge Barnes

Hearing date: 26 July 2018

Delivered at: Sydney

Delivered on: 26 July 2018

1.

2.

REPRESENTATION

Applicant: In person

Solicitors for the Respondents: Minter Ellison

ORDERS

- (1) The application be dismissed.
- (2) The Applicant pay the costs of the First Respondent fixed in the sum of \$6,000.
- (a)
- (3)
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1683 of 2016

SZRVA

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

3. This is an application for review of a decision of the Administrative Appeals Tribunal (the Tribunal) dated 3 June 2016. The Tribunal affirmed a decision of a delegate of the First Respondent not to grant the Applicant a Partner (Temporary) (Class UK) visa.
4. The Applicant, a citizen of Pakistan, arrived in Australia in 2011 as the holder of a student visa. His student visa was cancelled in December 2011.
5. The Applicant lodged a protection visa application in 2011. He was ultimately unsuccessful in judicial review proceedings in April 2014.

6. The Applicant applied for the partner visa in issue in these proceedings in May 2014 on the basis of his relationship with his sponsor. He provided statutory declarations and other documents in support of the application.
7. Relevantly, the Department wrote to the Applicant on 18 December 2014 indicating that he did not meet the criterion that his application for the partner visa be made within 28 days of his last substantive visa ceasing (see cl.820.211 in Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) and cl.3001 in Schedule 3 to the Regulations). The letter explained that Schedule 3 criteria could be waived where there were compelling reasons to not apply the criteria. He was invited to explain in detail the circumstances that led to him not holding a substantive visa and to provide information in relation to any compelling reasons and claims and documents.
8. By letter of 14 January 2015, the Applicant's agent requested a waiver and provided some further documents in support of the application. It was claimed that the Applicant's life was in danger, so that he could not return to Pakistan, that he was in a genuine and continuing relationship with his wife, that his wife was not working and that if forced to go overseas he would lose his job and it would bring hardship and financial difficulties to the family. It was also claimed that the Applicant's wife relied on him for ongoing financial help and emotional care. The Applicant also claimed he had not been able to explain his circumstances adequately in support of his protection visa application. The agent subsequently provided the Department with some additional documents in relation to the claimed relationship.
9. The application was refused. The delegate found that the Applicant did not satisfy the criterion in cl.3001 in Schedule 3 to the Regulations and was not satisfied that there were compelling reasons for waiving the Schedule 3 criteria.
10. The Applicant sought review by the Tribunal. He provided further documents to the Tribunal, including a copy of the delegate's decision record.
11. The Applicant was invited to attend a Tribunal hearing on 14 April 2016. In the hearing invitation letter of 24 March 2016, the Tribunal

advised the Applicant that one of the issues to be considered at the hearing was whether he had complied with the timeframe requirements in Schedule 3 when he lodged his partner visa application and, if not, whether there were any compelling reasons for not applying those requirements. The letter asked him to provide any additional relevant material he wished to rely on no later than 7 April 2016.

12. By email letter dated 13 April 2016 the Applicant's agent provided further material and written submissions in support of the claimed relationship. It was claimed that the Applicant was in a genuine relationship, that he could not leave his wife alone in Australia, that she could not travel to Pakistan, that the security situation was bad there and that he could not return because of terrorism activities. He referred to his past studies, intention to contribute in Australia and desire to have children.
13. The Applicant attended a Tribunal hearing on 14 April 2016. The only evidence of what occurred at the Tribunal hearing is the Tribunal's account in its reasons for decision. It is apparent that both the Applicant and his sponsor gave oral evidence and that the Tribunal raised various issues with the Applicant at the hearing.
14. By letter of 5 May 2016 the Applicant's agent provided further information and a supporting affidavit from the Applicant's father.
15. By letter of 16 May 2016, the Tribunal put to the Applicant information given by his sponsor at the Tribunal hearing for comment under s.359A of the *Migration Act 1958* (Cth) (the Act). The letter recorded the Tribunal's concerns about inconsistencies between that information and other information before it, in particular inconsistencies between the evidence of the Applicant and his sponsor in various respects, as well as inconsistencies in oral and written evidence. The Applicant's agent responded by letter of 29 May 2016.
16. On 3 June 2016 the Tribunal affirmed the delegate's decision. In its reasons for decision the Tribunal described supporting documentary evidence; summarised the claims made by the Applicant and by his sponsor in their written statements; referred to the delegate's decision and reasons; and referred to evidence provided to the Tribunal before, during and after the Tribunal hearing.

17. The Tribunal set out in some detail what occurred at the Tribunal hearing. It referred to issues it raised with the Applicant including, in particular, its concerns about the absence of supporting documentary evidence, such as evidence from Centrelink to show that Centrelink had been informed that the sponsor was married to the Applicant and statutory declarations or statements from the Applicant's and the sponsor's parents. The Tribunal also suggested that the sponsor may wish to obtain medical evidence to support the claims that she suffered from anxiety and in relation to how she might be affected if the Applicant had to leave Australia.
18. After the hearing, the agent provided an affidavit from the Applicant's father, but stated that the sponsor was unable to obtain any such evidence from her parents as she was not on good terms with them. The agent stated that the sponsor had not informed Centrelink about her marriage to the Applicant and that she was now afraid to do so. It was also claimed that she was a heart patient on medications, but supporting documents were not provided in that respect.
19. In considering the Applicant's claims, the Tribunal addressed the initial issue of whether the Applicant met Schedule 3 criteria as required by cl.820.211(2)(d). It found that his last substantive visa was the student visa that was cancelled on 17 December 2011; that he made the application for a partner visa on 9 May 2014; that he was not the holder of a substantive visa at the time he made the application for a partner visa; and that he did not satisfy the requirement in cl.3001 in Schedule 3 to the Regulations that the visa application be validly made within 28 days after he ceased to hold a substantive visa.
20. The Tribunal then considered whether it was satisfied that there were compelling reasons for not applying the criteria in Schedule 3 (consistent with the applicable criterion in cl.820.211(2)(d)). The Tribunal referred to the meaning of the concept "*compelling reasons*". It noted the absence of a statutory definition and referred to authorities to the effect that the reasons should be "*sufficiently convincing*" to move the decision-maker to exercise its discretion to waive the criteria; that the circumstances must be sufficiently powerful to lead to a positive finding in favour of waiver (see *MZYPZ v Minister for Immigration and Citizenship* [2012] FCA 478; (2012) 127 ALD 510 at

[10] and *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 77; (2005) 141 FCR 285 at [24]); and that the compelling reasons must be relevant to the purpose of permitting the person to make an application for a spouse visa in Australia (*Monakova v Minister for Immigration and Multicultural Affairs* [2006] FMCA 849 at [27]-[28]). The Tribunal expressly recognised that circumstances which constitute “*compelling reasons*” for not applying Schedule 3 criteria could arise at any time, including after the visa application was made, and referred in that context to *Waensila v Minister for Immigration and Border Protection* [2016] FCAFC 32; (2016) 241 FCR 121.

21. The Tribunal was of the view that in considering whether there were compelling reasons it needed to be satisfied that the Applicant and his sponsor were being truthful in their evidence as to their relationship and the claims which they stated were compelling reasons. However, for detailed reasons which it gave, the Tribunal found that it was not satisfied that the Applicant or the sponsor had been truthful in their evidence.
22. The Tribunal had regard to inconsistencies (which it detailed) in the evidence of the Applicant and his wife as to the circumstances surrounding the time of acceptance of his proposal of marriage and a related implausibility, insofar as the acceptance date suggested by the Applicant would have meant that they would have given the requisite notice of intended marriage before his proposal was accepted. The Tribunal considered, but did not accept, the sponsor’s claim that she had a poor memory as an explanation for the inconsistency in her evidence as to whether she agreed to marry the Applicant straight away or waited a month or two. It found this explanation implausible and also noted the absence of any medical evidence.
23. The Tribunal had regard to inconsistencies in the evidence about who attended the wedding of the Applicant and his wife (in particular whether the wife’s friend Sandy attended). The Tribunal found it implausible that a person would forget who of their few close friends had attended the wedding. It also took into account inconsistent evidence as to when the Applicant and his wife last saw Sandy; inconsistency as to whether they spent nights together before marriage;

an inconsistency between the wife's evidence and the agent's submission as to her parents' view of the marriage and relationship and as to whether they married in secret; and inconsistent evidence as to whether the wife and the Applicant had travelled together outside Sydney. The Tribunal noted the absence of documentary evidence in that regard.

24. In addition, the Tribunal had regard to inconsistent evidence as to whether Centrelink had been advised of the relationship (in circumstances where the wife was in receipt of Centrelink benefits). The Tribunal recorded that at the hearing the wife had said that she had advised Centrelink of the marriage and that it had indicated that it needed documentary evidence. However after the hearing the agent stated that the wife had not informed Centrelink about the marriage, that she was a heart patient on medication who could not sustain any stress and that she was afraid of informing Centrelink about the 2014 marriage. The Tribunal found this evidence inconsistent and also that the wife's failure to advise Centrelink that she was married was strong evidence that the relationship was not genuine.
25. The Tribunal recorded that it had put to the Applicant inconsistencies and implausibilities which contained information subject to s.359A of the Act. It stated that it had considered the implausibilities and inconsistencies and the responses. It was not satisfied that either the Applicant or the sponsor had been truthful in their evidence. It found that the response of the Applicant's agent had done little to explain satisfactorily why there would be such inconsistencies and implausibilities. In particular, the Tribunal did not accept as plausible the claim that typographical errors, confusion or the wife's weak memory and claimed health conditions (such as her "*nervous system and heart weakness*") were responsible for the inconsistencies and implausibilities. It had regard to the absence of any medical evidence to support any of the claims regarding the wife's claimed medical conditions or impairments. The Tribunal was not satisfied on the evidence before it that the wife had these claimed conditions or impairments.
26. The Tribunal also saw it as significant that there was no plausible explanation for why the wife had claimed at the hearing that her

parents now got on well with the Applicant and with her, but then in response to the Tribunal's request for a statutory declaration from her parents as to the genuineness of the relationship, it was claimed that relations were "*not good at all*". The Tribunal also found significant the absence of any plausible explanation as to why the wife had not reported the marriage to Centrelink if it was genuine.

27. The Tribunal continued at paragraph 91:

The Tribunal's (sic) thus finds that neither the applicant nor the sponsor are being truthful with it as to their spouse relationship, and that this is, in fact, a contrived spouse relationship for migration purposes. The Tribunal thus concludes that any supporting documentary evidence provided to the Department and Tribunal has also been created or obtained to assist the applicant in establishing this contrived spouse relationship.

28. The Tribunal found that this conclusion weighed heavily in terms of its consideration of whether there were compelling reasons. Based on its findings, the Tribunal concluded that all the reasons given by the Applicant and his wife as to why the Applicant could not apply for this visa offshore were also fabrications to assist the Applicant in establishing compelling reasons.

29. While the Tribunal accepted that as a Pakistani citizen the Applicant may have to return to Pakistan, given its view of his truthfulness it was not satisfied that any of his specific or general claims to fear harm there were the truth. Hence it was not satisfied that he faced a risk of harm should he have to return. It continued, in the alternative:

*In any event, even if he did face harm, it would not be in the context of him returning to make an application for a partner visa on the basis that his relationship with his wife is that of a **genuine** spouse, and thus would not be found to be compelling. (emphasis in original)*

30. The Tribunal concluded that there were not compelling reasons for not applying the Schedule 3 criteria and hence that the Applicant did not satisfy cl.820.211. It therefore affirmed the decision not to grant him a partner visa.

31. The Applicant sought review by application filed on 30 June 2016. The application contains three grounds. The accompanying affidavit

appears to raise an additional ground which was addressed in submissions for the Minister.

32. The Applicant did not file written submissions. He was given the opportunity today to address the grounds in his application and affidavit and also to raise any other concerns that he had with the Tribunal decision or procedures.
33. He had little to add to the grounds. He suggested that the Tribunal had asked him for evidence in relation to compelling circumstances and that there was “*a letter from Centrelink to the Tribunal*”. The Applicant was not able to explain what this suggested letter might address and stated that he was not aware of the importance of the asserted letter from Centrelink to these proceedings. He appeared to seek an adjournment in order to make inquiries of his migration agent. There is no evidence of any such letter in the material before the court. Nor is there any evidence or suggestion that the Applicant or his agent provided any such letter from Centrelink to the Tribunal.
34. In all the circumstances I did not consider that an adjournment was in the interests of the administration of justice or the parties. It would appear that, at most, this was intended to be a reference to evidence that the Applicant’s wife was in receipt of Centrelink benefits (as was before the Tribunal in the form of a copy of a letter to the sponsor of 17 December 2014 about her Newstart Allowance rate). However this was not a matter that was in issue before the Tribunal. What was in issue was whether Centrelink was aware of the marriage. As indicated, the Applicant’s agent informed the Tribunal after the hearing that (contrary to what the wife said at the hearing) she had not informed Centrelink of the marriage.
35. The first ground in the application is as follows:
 1. *The Tribunal in its decision at paragraph 91 states: ‘The Tribunal thus concludes that any supporting documentary evidence provided to the Department and to the Tribunal has also been created or obtained to assist the applicant in establishing this contrived spouse relationship’.*

*The Tribunal fell into **jurisdictional error** by concluding that any supporting documentary evidence provided to the Department and Tribunal has been created or obtained assist the applicant in*

establishing this contrived spouse relationship. Whereas Department is unable to prove any documentary evidence as Bogus or not genuine. (errors and emphasis in original)

36. Insofar as there is an assumption underlying this ground that the Tribunal made a finding that all the documentation provided by the Applicant (including not only statutory declarations, but also evidence such as bank statements, gas accounts, and other third party documentation) was “*bogus*” or fabricated, that is not the case. Rather, the Tribunal found that supporting documentation had been created or “*obtained*” to assist the Applicant to establish what the Tribunal saw as a contrived spouse relationship.
37. At various points in its reasons for decision the Tribunal identified in some detail the supporting documentation that had been provided. It has not been established that the Tribunal overlooked any critical item of documentary evidence in a manner going to jurisdiction (see *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99). The Tribunal identified and considered what it saw as significant inconsistencies and implausibilities of concern, as well as the absence of particular documentary evidence which it would have expected and the relevance of the absence of supporting documentary corroboration. The finding at paragraph 91 was made on the basis of a finding that the parties were not being truthful in their evidence and that the claimed relationship was contrived for migration purposes.
38. The Tribunal’s findings were reasonably open to it on the material before it for the reasons which it gave. Contrary to the contention in the particulars to this ground, the Tribunal was not required to have before it affirmative proof that the Applicant’s documentary evidence was “[*b*]ogus or not genuine” before reaching the conclusion it did. The finding that documentation was created or obtained to assist the Applicant flowed from the Tribunal’s finding that the relationship was a contrived spousal relationship. As the First Respondent submitted, for the Tribunal to reason in this manner was not such as to demonstrate jurisdictional error (see generally *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59 and *Minister for Immigration and Citizenship v SZNSP* [2010] FCAFC 50; (2010) 184 FCR 485).

39. Further, while I have borne in mind that credibility findings are not immune from review, there is nothing in the circumstances of this case to indicate any jurisdictional error of the manner considered in *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; (2016) 253 FCR 496 or otherwise. Ground 1 is not made out.

40. Ground 2 is as follows:

2. The Tribunal in its decision at paragraph 94 states: ‘the applicant may have to return to Pakistan. However, given its view of his truthfulness, it is not satisfied that any of his specific or general claims to fear harm there are the truth. It is thus not satisfied that he faces a risk of harm should he have to return.’

*The Tribunal fell into **jurisdictional error** by finding that applicant will not suffer harm if he has to return to Pakistan and applicant faces real risk. The Tribunal and Department fail to consider country profile and real risk which applicant faces if he returns to his home country Pakistan. (errors and emphasis in original)*

41. Had the Tribunal’s consideration of the Applicant’s claim that the fact he would have to return to Pakistan was a compelling reason stopped with the quote referred to in this ground, the ground might have more force. However, in addition to rejecting the Applicant’s claims on the basis of his lack of truthfulness (in the sense that it was not satisfied that any of his specific or general claims to fear harm were the truth), the Tribunal also concluded, in the alternative, that even if the Applicant did face harm in Pakistan it would not be in the context of him returning to make an application for a partner visa on the basis of a genuine spousal relationship. It found on that basis that such a concern would not be compelling (and see *Monakova*). This is not a case in which the Tribunal erroneously limited its consideration to reliance on the outcome of the Applicant’s earlier protection visa application in the manner considered in *MZYPZ*. This ground is not made out.

42. Ground 3 is that:

3. The Tribunal in its decision in paragraph 95 states: ‘in regards to cl. 820.211(2) (d)(ii), the Tribunal finds that there are not compelling reasons for not applying the schedule 3 criteria. Hence the applicant does not satisfy cl.820.211.’ The Tribunal denied the applicant procedural fairness and thereby fell into

jurisdictional error by failing to consider compelling reasons for not applying the Schedule 3 criteria. (emphasis in original)

43. I asked the Applicant about his contention that there was a denial of procedural fairness. He was unable to identify anything that he felt was unfair in the Tribunal decision or procedures. In addition beyond a general contention that the Tribunal may not have considered all of the material before it, he was not able to identify any failure by the Tribunal to comply with its obligations in Division 5 of Part 5 of the Act.
44. Insofar as it was intended to be contended that the Tribunal failed to consider a claimed compelling reason or item of evidence, the Applicant has not identified any item of evidence not considered, other than the suggestion that there may be an unspecified letter from Centrelink to the Tribunal. In circumstances where the evidence put to the Tribunal by the Applicant's agent was that there was no notification to Centrelink of the marriage by the Applicant's sponsor this suggestion is not indicative of jurisdictional error.
45. If the Applicant's contention is that the Tribunal did not accept the documentary evidence provided in support of the claimed relationship or did not consider his claimed compelling reasons, the Tribunal identified and addressed the preliminary issues of the Schedule 3 criteria time limit waiver and the Applicant's claims in relation to compelling reasons. It rejected the truthfulness of the evidence of the Applicant and his wife as to their relationship and the claims they stated were compelling reasons. It found (relevant to its consideration of whether there were compelling reasons to waive the Schedule 3 criteria) that the relationship was contrived and hence it rejected as fabrications claimed reasons based on the relationship for why the Applicant could not apply for the visa offshore.
46. In essence, the asserted compelling reasons related to the claimed genuineness of the relationship, the need for the Applicant to provide financial and emotional support to his wife, as well as the concern that he would face harm in Pakistan if he were to return there. The Tribunal sufficiently addressed those contentions.

47. The Tribunal understood that the claims as to compelling reasons were those said to flow from the claimed genuineness of the relationship. It considered those claims and the claims about the risks to the Applicant in Pakistan. The Applicant also told the Tribunal that his wife had a heart problem but that it was not that serious. The Tribunal nonetheless gave the Applicant and his wife the opportunity to put on further evidence in relation to the wife's claims about anxiety and her health and the impact on her of the Applicant's return to Pakistan. No such further documentary evidence was provided.
48. In these particular circumstances it was unnecessary for the Tribunal to also address the issue of whether the Applicant met the visa criterion that he was the "*spouse*" of the sponsor within s.5F of the Act and in that context to consider the matters in reg.1.15A and the supporting documentary evidence.
49. The First Respondent submitted that s.359A obligations were not enlivened in this matter. It is unnecessary to determine that issue in this case. The Tribunal purported to act under s. 359A of the Act. It put to the Applicant the evidence of his sponsor, in circumstances where it considered there were inconsistencies between that evidence and other evidence. Whether or not s.359A was in fact enlivened in that situation, the Tribunal did not fall into jurisdictional error by choosing to put to the Applicant matters of concern to it.
50. It may be that in this ground (and in paragraph 8 of the supporting affidavit, which repeats that the Tribunal denied the Applicant procedural fairness) it is intended to assert that the Tribunal denied the Applicant procedural fairness and fell into jurisdictional error, including by failing to consider whether there were compelling reasons for not applying the Schedule 3 criteria.
51. First, it is apparent from the delegate's reasons, the Tribunal's hearing invitation and its summary of matters traversed at the hearing that the Applicant was put on notice of the determinative issues arising in relation to the review. There is nothing to establish any failure by the Tribunal to comply with s.360 of the Act. Further as indicated the Tribunal considered whether there were compelling reasons for not applying the Schedule 3 criteria.

52. Insofar as this ground takes issue with the merits of the Tribunal's decision, in particular its failure to accept the truthfulness of the parties and the genuineness of the spousal relationship in the context of considering compelling reasons, it seeks impermissible merits review. The Tribunal properly referred to the concept of compelling reasons, including the absence of a statutory definition, authorities to the effect that the reasons should be sufficiently convincing to move the decision-maker to exercise the discretion to waive the criteria and the need for the circumstances to be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the criteria (as discussed by Bromberg J in *MZYPZ* at [10]). It also considered that the compelling reasons must be relevant to the purpose of permitting the person to make an application for a spouse visa in Australia rather than having to return to the country of origin to make an offshore application. The Tribunal correctly understood that, in accordance with *Waensila*, compelling reasons could arise at any time, including after the time of the visa application.

53. Bromberg J stated in *MZYPZ* at [12]:

In the evaluative judgment to be made, the decision-maker may consider a single circumstance or a multitude of circumstances. Ultimately, the question is whether the circumstances as a whole compel the decision-maker to exercise the discretion conferred.

54. The Tribunal approached the issue of forming a judgement about compelling reasons in this case having regard to the circumstances as a whole in this sense. It was not necessary for it to “tick off” each of the items of evidence related to the claimed genuineness of the relationship in considering whether there were compelling reasons. It has not been established that the Tribunal failed to consider an integer of the Applicant's claims or evidence or that it engaged in a non-existent or cursory assessment or otherwise failed to carry out its statutory task.

55. It is well-established that the Tribunal's obligation is to consider the case put to it (see *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145; (2010) 190 FCR 248). The Tribunal must engage in an active intellectual process. In this case, the initial issue for the Tribunal was whether there were compelling reasons to waive the Schedule 3 criteria. There were no prescribed circumstances which

had to be the subject of the Tribunal's genuine consideration. The Tribunal engaged in the necessary evaluation of the material before it in not being satisfied that there were compelling reasons to waive the Schedule 3 criteria. Insofar as a concern in this respect was intended to be raised in ground 3 (or as a separate ground of review) no jurisdictional error has been established on that basis.

56. In paragraph 9 of the affidavit accompanying the original application it was submitted that the Tribunal had shown unreasonableness in not considering that the Applicant loved his wife and she loved him and that due to security reasons he could not take his wife to Pakistan to lodge an offshore partner visa application. First, this is not a case in which there was a relevant discretionary exercise of power in issue in the sense considered in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332. The assertion of unreasonableness appears to relate to the decision-making process or outcome. There is, however, an evident and intelligible justification for the Tribunal's findings relevant to the issue before it. There is a logical and probative basis in the Tribunal's reasoning about the truthfulness of the Applicant and his wife and the contrived nature of the relationship on the way to its conclusion in relation to whether it was satisfied that there were compelling reasons for waiver (see *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1). It has not been established that there was legal unreasonableness in the Tribunal's decision-making or the outcome of the Tribunal decision.

57. Insofar as this contention amounts to a disagreement with the Tribunal's conclusions it seeks impermissible merits review.

58. As no jurisdictional error has been established on any of the bases contended for by the Applicant, the application must be dismissed.

59. RECORDED : NOT TRANSCRIBED

60. The unsuccessful Applicant should meet the costs of the First Respondent. The amount sought is reasonable and appropriate in light of the nature of this and other similar matters.

I certify that the preceding fifty-seven (57) paragraphs are a true copy of the reasons for judgment of Judge Barnes

Date: 9 August 2018